



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
12/609,638	10/30/2009	Kristin N. Dodd	3712036-01104	8805

29157 7590 04/27/2017
K&L Gates LLP-Chicago
P.O. Box 1135
CHICAGO, IL 60690

EXAMINER

LEBLANC, KATHERINE DEGUIRE

ART UNIT	PAPER NUMBER
----------	--------------

1791

NOTIFICATION DATE	DELIVERY MODE
-------------------	---------------

04/27/2017

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

USpatentmail@klgates.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte KRISTIN N. DODD, STEVEN P. GREINER,
BERNARD WILLIAM CONWAY III, RACHEL YOST,
LISA A. FOSTER, and PATRICIA STOCKWELL

Appeal 2015-007301
Application 12/609,638
Technology Center 1700

Before JAMES C. HOUSEL, JULIA HEANEY, and LILAN REN,
Administrative Patent Judges.

HOUSEL, *Administrative Patent Judge.*

DECISION ON APPEAL¹

Pursuant to 35 U.S.C. § 134(a), Appellants² appeal from the Examiner's decision rejecting claims 1–13. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

¹ Our decision refers to the Specification (Spec.) filed October 30, 2009, the Examiner's Final Office Action dated October 29, 2014, Appellants' Appeal Brief (Appeal Br.) filed February 3, 2015, the Examiner's Answer (Ans.) dated June 19, 2015, and Appellants' Reply Brief (Reply Br.) filed August 3, 2015.

² According to Appellants, the real party in interest is Nestec S.A. Appeal Br. 2.

We REVERSE.

STATEMENT OF THE CASE

The invention relates to a double-crust pizza product and a method of forming the product. Spec. ¶ 1. Appellants disclose that known double-crust pizza products, e.g., calzones, stromboli, etc., join the peripheral edge of the overlapping crusts to form a continuous pocket structure. *Id.* at ¶¶ 1–3. However, according to Appellants, joining the peripheral edge of the crusts prevents visual access of the contents of the pizza product to consumers who cannot, therefore, determine the freshness, quality and quantity of the ingredients. *Id.* at ¶ 4. Appellants disclose providing a peripheral gap between the two pizza crusts to enable visual inspection of the product ingredients and determine freshness, quality, and quantity of ingredients. *Id.* at ¶ 6. In addition, Appellants disclose providing two sauce layers, one adjacent each of the inner surfaces of the respective crusts, with desired ingredients disposed between the sauce layers. *Id.* at ¶¶ 23–26. Appellants disclose that these sauce layers, owing to their high water content, can provide a medium for adhesion of ingredients and the pizza crusts, particularly when frozen. *Id.*

Claim 1, reproduced below from the Claims Appendix to the Appeal Brief, is illustrative of the subject matter on appeal.

1. A double-crust layer pizza product, comprising:
 - a lower crust layer forming a base, the lower crust layer having an inner surface;
 - an upper crust layer positioned above the lower crust layer, the upper crust layer having a [sic – an] inner surface, at least a portion of the inner surfaces of the lower crust layer and the upper crust layer spaced from one another defining a gap therebetween that continuously extends along the peripheral

edges of the upper and lower crust layers around the entire periphery of the product;

a first sauce layer directly adjacent to the inner surface of the lower crust layer and positioned between the lower and upper crust layers, the first sauce layer having a water concentration of about 50 percent weight or less;

a second sauce layer directly adjacent to the inner surface of the upper crust layer and positioned between the lower and upper crust layers, the second sauce layer having a water concentration of at least about 47 percent weight; and

at least one ingredient positioned at least partially between the first sauce layer and the second sauce layer.

REJECTIONS

The Examiner maintains, and Appellants request our review of, the following grounds of rejection under 35 U.S.C. § 103(a):

1. Claims 1–4, 6, 12, and 13 over Giordano³ in view of Violi⁴ and King,⁵ and as evidenced by the USDA Food List (White Sauce);⁶
2. Claim 5 over the above combination further in view of Garber;⁷
3. Claim 7 over the above combination further in view of Lehmann;⁸
4. Claims 8–10 over the above combination further in view of Lehmann and Garber; and
5. Claim 11 over the above combination further in view of Amigh.⁹

ANALYSIS

Rejection 1: Obviousness over Giordano in view of Violi and King, as evidenced by the USDA Food List (White Sauce)

The Examiner finds Giordano teaches a double-crust pizza product as recited in claim 1, including a lower crust layer forming a base, an upper crust layer positioned above the lower crust layer with a peripheral gap therebetween, a first sauce layer directly adjacent the inner surface of the

³ US 4,283,431, issued August 11, 1981.

⁴ US 2004/0009266 A1, published January 15, 2004.

⁵ US 6,156,356, issued December 5, 2000.

⁶ <http://ndb.nal.usda.gov/ndb/foods/show/1280>, “Release 26, Basic Report: 06165, Sauce, homemade, white, thin”, Nutrient Database for Standard Reference, The National Agricultural Library, United States Department of Agriculture (USDA), accessed April 29, 2014 (hereinafter, as referenced by the Examiner, “USDA Food List (White Sauce)”).

⁷ CA 2 241 577 A1, published December 24, 1999.

⁸ Lehmann, Tom, “Pressed, Sheeted, or Hand-Tossed: Toss Like a Pro[®]”, <http://www.prodoughusa.com/doughforming.html>, accessed November 23, 2011.

⁹ US 2003/0209194 A1, published November 13, 2003.

lower crust layer, a second sauce layer on an outer surface of the upper crust layer, and at least one ingredient positioned between the sauce layers. Ans.

4. The Examiner finds that the peripheral gap is formed because the first sauce layer and the ingredients separate the two crust layers. *Id.* at 4–5. The Examiner acknowledges that Giordano fails to teach the sauce layers have different moisture contents, but finds “Violi teaches a multi-layer pizza product comprising two different sauce layers, red and white.” *Id.* at 5. The Examiner further finds that a traditional red tomato sauce is known to be thicker and therefore have lower moisture content than a traditional white sauce. *Id.* The Examiner concludes that “[i]t would have been obvious to use two different sauces with different textures and moisture contents in Giordano as taught in Violi in order to provide a variety of textures and flavors to the food product.” *Id.* The Examiner further finds that the USDA Food List (White Sauce) teaches white sauce has an 81% moisture content, presumably meeting the requirement that the second sauce have a moisture content of at least about 47%. *Id.* at 5–6. In addition, the Examiner finds King teaches a tomato sauce whose water content is 10–25%, presumably meeting the requirement that the first sauce have a moisture content of 50% or less. *Id.*

The Examiner also acknowledges that the proposed combination of Giordano, Violi, and King, as evidenced by the USDA Food List (White Sauce), fails to teach placing the lower moisture content sauce on the inner surface of the lower crust and the higher moisture content sauce on the inner surface of the upper crust. *Id.* at 6. Nonetheless, the Examiner concludes that varying placement of the sauces would have been obvious depending on the taste profile desired. *Id.* In this regard, the Examiner finds that a

consumer would taste the upper sauce layer first and, therefore, if one desired to taste the higher moisture content sauce first, one would place this sauce on the top crust layer. *Id.* The Examiner further finds placement of the lower moisture content sauce on the lower crust layer would have been obvious because “it is heavier than the sauce of higher moisture content,” which would prevent the heavier sauce from falling from the crust and leaking out the sides. *Id.*

Finally, the Examiner acknowledges that Giordano places the second sauce layer on the outer surface, rather than the inner surface, of the upper crust layer, but concludes that modifying placement of the sauce layers depending on the desired taste profile is easy, requiring no more than routine skill in the art, and would therefore have been obvious. *Id.* The Examiner finds that Appellants are merely modifying sauces and toppings in the process of pizza making and have not shown any new or unexpected results from the modification of these common ingredients, citing *In re Levin*, 178 F.2d 945, 948 (CCPA 1949). Ans. 16.

Appellants argue that placing Giordano’s second sauce layer between the top cheese layer and the upper crust layer is contrary to Giordano’s explicit teachings. Appeal Br. 8 (citing Giordano 1:23–42, “it is extremely critical that cheese be on top of the mixture”; 2:2–7, “the final layer of ingredients in the first pre-baked pastry shell must consist of cheese”). Indeed, Appellants contend that Giordano actually teaches away from such placement. *Id.* at 9.

In addition, Appellants argue that Violi teaches a pizza product having a single sauce layer, contrary to the Examiner’s finding that Violi teaches a pizza product having two different sauces. *Id.* at 11–12. Further, Appellants

argue that neither King nor the USDA Food List (White Sauce) teach or suggest using a red sauce and a white sauce as Giordano's first and second sauces respectively. *Id.* at 12. Appellants assert that King merely teaches a tomato sauce having a 10–25% water content and the USDA Food List (White Sauce) merely teaches the water content of a white sauce. *Id.* As such, Appellants contend that none of the prior art teaches or suggests any approach whereby the first sauce layer adjacent the inner surface of a lower crust layer has about a 50% or less water content and a second sauce layer adjacent the inner surface of an upper crust layer has at least about a 47% water content. *Id.*

After review of the opposing positions articulated by Appellants and the Examiner, the applied prior art, and Appellants' claims and Specification disclosures, we determine that the Appellants' arguments are sufficient to identify reversible error in the Examiner's obviousness rejections. *In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011). To begin, we note that the Examiner's finding that Violi teaches a multi-layer pizza product comprising two different sauce layers lacks evidentiary support. A careful review of Violi reveals that Violi actually teaches, as Appellants argue, a single sauce layer which can be selected from several different options including a red tomato sauce, a white sauce, and salsa. Violi ¶ 22.

In addition, we are persuaded that Giordano teaches away from applying the second sauce to the inner surface of the upper crust layer. When the prior art teaches away from a combination, that combination is more likely to be nonobvious, *KSR Int'l. Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007). "A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from

following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant.” *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994). Further, references in a combination may be said to teach away where their combined teachings would produce a “seemingly inoperative device”. *See In re Spinnoble*, 405 F.2d 578, 587 (CCPA 1969). A careful review of Giordano reveals that Giordano teaches it is extremely critical that cheese be on top of the mixture between the two pizza crusts to ensure “a moist texture which prevents dryness as is found in regular pizza-type products.” Giordano 1:27–30. Giordano also specifically teaches that the upper crust layer is contiguous to the cheese layer. *Id.* at 2:8–12. Thus, Giordano teaches that the final layer of ingredients must consist of cheese, thereby discouraging the placement of other ingredient layers, including sauce layers, between the final cheese layer and the upper crust layer. A prior art reference teaching away from a given combination is evidence that one of ordinary skill in the art would not have been motivated to make that combination to arrive at the claimed invention. *See Rembrandt Wireless Tech., LP v. Samsung Elec. Co., Ltd.*, No. 2016-1729, p. 13 (Fed. Cir. 2017).

On the other hand, Appellants disclose that placement of the first and second sauces with specific water contents adjacent the inner surfaces of the lower and upper crust layers, respectively, provides media for adhesion of the ingredients and the crusts, especially when frozen. The Examiner’s only basis for modifying Giordano, against Giordano’s explicit teaching away, to include a second sauce layer adjacent the inner surface of the upper crust layer is to provide a desired taste profile. However, the Examiner fails to explain why and how merely changing the placement of this layer from the

upper surface of the upper crust layer to the lower surface would alter the taste profile.

The Examiner has the initial duty of supplying the requisite factual basis and may not, because of doubts that the invention is patentable, resort to speculation, unfounded assumptions or hindsight reconstruction to supply deficiencies in the factual basis. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992) (“[T]he examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability”). To establish a *prima facie* case of obviousness, the Examiner must show that each and every limitation of the claim is described or suggested by the prior art or would have been obvious based on the knowledge of those of ordinary skill in the art. *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (“To facilitate review, [the obviousness] analysis should be made explicit.”); *see also In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (“[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.”) (*quoted with approval in KSR*, 550 U.S. at 418).

Because the Examiner’s obviousness conclusion is based on the erroneous finding that Violi teaches a multi-layer pizza product comprising two different sauces and requires a modification to Giordano that is specifically taught away, the Examiner’s obviousness conclusion lacks sufficient rational underpinning. We are mindful of the holding and dicta of *In re Levin*. However, we do not see that Appellants’ pizza product and method of forming this product are merely “new recipes or formulas for cooking food which involve the addition or elimination of common

ingredients, or for treating them in ways which differ from the former practice.” Instead, Appellants’ pizza product is a structural product and Appellants disclose a cooperative relationship between the sauce layers, the at least one ingredient(s), and the two pizza crust layers. Accordingly, the *Levin* decision is not controlling based on the facts and issues before us in this appeal.

It follows, therefore, that we will not sustain the Examiner’s obviousness rejection of claim 1 or its dependent claims. Method claim 6 recites a method of forming a double layer pizza product similar to that of claim 1 except that the range of water content of the second sauce layer is somewhat broader (at least 40 wt.% versus at least about 47 wt.%). For the same reasons given above with regard to claim 1, we likewise will not sustain the Examiner’s obviousness rejection of claim 6 or its dependent claims.

We note the Examiner does not rely on any of Garber, Lehmann, and Amigh to remedy the deficiencies in the Examiner’s proposed combination of Giordano, Violi, and King, as evidenced by the USDA Food List (White Sauce). It follows that we will not sustain the Examiner’s obviousness rejections based on these additional prior art references.

DECISION

Upon consideration of the record, and for the reasons given above and in the Appeal and Reply Briefs, the decision of the Examiner rejecting claims 1–13 under 35 U.S.C. § 103(a) as unpatentable over the combination of Giordano, Violi, King, and the USDA Food List (White Sauce), alone or further in view of Garber, Lehmann, and/or Amigh, is *reversed*.

Appeal 2015-007301
Application 12/609,638

REVERSED